BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C.

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| In the Matter of | ) | |
| | ) | |
| Petition to Extend Rate Regulation | ) | PR Docket No. 94-108 |
| Filed by the New York Public | ) | |
| Service Commission | ) | |

**REPLY COMMENTS**
**OF THE**
**CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")[1] respectfully submits its Reply Comments in the above-captioned proceeding.

## I. THE PROPER STANDARD FOR RETAINING STATE REGULATION HINGES UPON A FINDING OF SUFFICIENT COMPETITION, NOT MARKET DOMINANCE.

A number of respondents in this proceeding claim that the states are justified in retaining jurisdiction over the rates of cellular CMRS providers but not the rates of non-cellular CMRS providers, based on the characterization of cellular carriers as "dominant."[2] By referring to cellular carriers as "dominant,"

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[1] CTIA is a trade association whose members provide commercial mobile services, including over 95 percent of the licensees providing cellular service to the United States, Canada, Mexico, and the nation's largest providers of ESMR service. CTIA's membership also includes wireless equipment manufacturers, support service providers, and others with an interest in the wireless industry.

[2] Comments of Nextel Communications, Inc. at 11-14; Comments of Association of Mobile Telecommunications Association,

these respondents seek to imply, without the benefit of empirical evidence, that cellular operators have market power and exercise bottleneck control over their facilities, thereby impeding competition. More importantly, assertions that states should be permitted to use "dominance" as a basis for regulating CMRS providers as distinct from non-cellular CMRS providers flies in the face of the Commission's decision in the CMRS Second Report and Order.[3]

In enacting last year's amendments to Section 332(c) of the Communications Act, Congress did not impose a "dominant" and "non-dominant" standard as the statutory test for state preemption of CMRS providers. Respondents' unsubstantiated claims misapprehend the test established by Congress for the extension of state regulation of CMRS. Congress directed the Commission to authorize state rate regulation of CMRS based on a state's showing, supported by empirical evidence, that "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or

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Inc. at 5-7; Comments of National Cellular Resellers Association at 2-3.

[3] Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket No. 93-252, 9 FCC Rcd 1411 (1994)("Second Report and Order").

unreasonably discriminatory."[4] By establishing such requirements, Congress intended the Commission to ensure that State regulation is consistent with the overall intent of Section 332(c)(3), "so that...*similar services are accorded similar regulatory treatment.*"[5] Neither the State of New York, nor any of the respondents in this proceeding, have provided the requisite empirical evidence to satisfy the statutory test for the authorization of state regulation of CMRS. This test, in fact, is the same statutory test the Commission analyzed when it determined to exercise its forbearance authority under § 332.

Earlier this year, when it applied the statutory test for exercising regulatory forbearance of cellular service, the Commission found determinative that the level of competition sufficiently protected consumers from unjust and unreasonable discrimination. The Commission's analysis yielded a finding that "the current state of competition regarding cellular services

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[4] 47 U.S.C. § 332(c)(3).

[5] H.R. Rep. No. 213, 103d Cong., 1st Sess. 494 (emphasis added). While Congress was well aware of the dominant/non-dominant distinction when it enacted the Budget Act, Congress did not impose any requirements that the Commission classify a CMRS provider as "non-dominant" to justify forbearance or state preemption. See e.g., H.R. Rep. No. 111, 103d Cong., 1st Sess. 260-61 (stating that the Committee was aware of the Court of Appeals decision voiding the "Commission's long standing policy of permissive detariffing, applied to non-dominant carriers.")

does not preclude our exercise of forbearance authority."[6] Similarly, the Commission's statement that the cellular market may not "be fully competitive" does not undermine the overall finding of a sufficient level of competition within cellular services, thereby obviating the need for state regulation.[7]

It bears repeating that none of the respondents in this proceeding have substantiated their allegations regarding the level of competition in cellular with any empirical evidence. Reliance upon the unsupported opinions of the proponents of state regulation is not a substitute for economic analysis of actual market conditions. Yet economic analysis is precisely what the states and respondents fail to offer to bolster their claims that cellular providers have market power.

Even if the unsubstantiated claims regarding the previous level of competition were correct, respondents are taking a

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[6] Regulatory Treatment of Mobile Services, Second Report and Order in GN Docket No. 93-252, 9 FCC Rcd 1411, 1467 (1994)("Second Report and Order").

[7] Second Report and Order at 1478. Recently, the Commission has stated that even the existence of large, multi-market cellular firms does not necessarily limit competition in the cellular marketplace, because, "the wireless communications business is one in which relatively small, entrepreneurial competitors have often been as successful as large ones . . . ." Applications of McCaw and AT&T for Consent to the Transfer of Control of McCaw Cellular Communications and its Subsidiaries, File Nos. ENF-93-44 and 05288-CL-TC-1-93 et al., Memorandum Opinion and Order, FCC 94-238 at ¶ 38 (Released September 19, 1994)("Applications of AT&T/McCaw").

"rear-view mirror approach" to cellular regulation. Whatever the state of competition in the past, wireless services stand poised to experience an explosion of new competition from ESMR and PCS. Therefore, regardless of the current state of competition, the entry of strong, aggressive new competitors in the coming year will infuse substantial new competition into the industry and assure cost-based prices for CMRS services. The Commission itself expects that the level of competition in the cellular marketplace will continue to intensify: "We anticipate that the advent of PCS will open the commercial radio services . . . marketplace, which includes cellular service, to intense competition."[8] For the Commission to ignore the impact of these new CMRS competitors that it so successfully has brought into the market would be neither responsible nor correct.

## II. THE CMRS INDUSTRY PERFORMS COMPETITIVELY

As CTIA has shown repeatedly and contrary to respondents' unsupported opinions, the CMRS industry does perform competitively.[9] In addition, recent analyses by the Commission refute the allegations that cellular providers impede competition

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[8] Applications of AT&T/McCaw at 25.

[9] See Drs. Stanley Besen, Robert J. Larner, and Jane Murdoch, Charles River Associates, "The Cellular Service Industry: Performance and Competition" (Nov. 1992), submitted, *inter alia,* as an attachment to CTIA Opposition in this docket (Sept. 19, 1994).

by maintaining bottleneck control of cellular facilities.[10] In recently granting AT&T/McCaw's transfer of control application, the Commission rejected BOC requests for the imposition of MFJ equal access requirements upon the merged entity. Significantly, the Commission found:

> [t]he rationale for the MFJ's [equal access] limitations on the BOCs -- the existence of a long-entrenched exchange service bottleneck encompassing virtually every home and business in the BOCs' territories -- does not apply to AT&T/McCaw. In the absence of a factual rationale for applying the MFJ to AT&T/McCaw, doing so would be counterproductive.[11]

Additional findings by the Commission also undermine various respondents' claims that the existence of only two cellular providers per service area is anti-competitive or injurious to consumers.[12] Significantly, the Commission has found that, "the

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[10] Comments of National Cellular Resellers Association at 3. While NCRA appends only a bibliography of Federal documents as authority for lack of competition, such a listing unaccompanied by any analysis is far from persuasive. Further, if the Commission closely examines the Appendix, it will find that NCRA's "proof" is another example of its repeated attempts to distort reality to make otherwise untenable conclusions appear plausible. See Appendix to Comments by the National Cellular Resellers Association.

[11] Applications of AT&T/McCaw at 20 (footnote omitted). The Commission characterized the BOCs' bottleneck exchange services as "historical" and "ubiquitous," while describing cellular service as "relatively new, serving only a small percentage of the population." Applications of AT&T/McCaw at 24.

[12] Comments of American Mobile Telecommunications Association at 6-7; Comments of National Cellular Resellers

existence of two facilities-based [cellular] carriers has created a degree of rivalry not present in `wireline' exchange services under the former Bell system."[13]

## III. THE COMMISSION SHOULD REJECT PROPOSALS TO ALLOW STATES TO IMPOSE DIFFERENT REGULATORY REGIMES ON CELLULAR AND NON-CELLULAR CMRS PROVIDERS.

In commenting upon the state petitions to retain CMRS regulations, various respondents have requested the Commission to authorize states to maintain disparate regulatory regimes within the CMRS classification.[14] In particular, they have asked the Commission to authorize states to single out cellular CMRS providers for regulation as distinct from all other functionally-equivalent CMRS providers. Even if we were to assume, *arguendo*, that the level of competition in the CMRS marketplace was insufficient to adequately protect consumers from unjust and unreasonable rates or discrimination, the Commission should reject respondents' requests for disparate state regulation of competitive services as violative of both the letter and the policy of § 332(c) of the Communications Act.

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Association at 2-3; Comments of Nextel Communications, Inc. at 12-13.

[13] Applications of AT&T/McCaw at 24.

[14] See, e.g., Comments of the American Mobile Telecommunications Association, Inc. at 6-7; Comments of Nextel Communications, Inc. at 9.

Congress revised § 332(c) to establish regulatory parity for substantially similar forms of CMRS. This action was taken to remedy the disparate regulatory treatment of such services.[15] In so doing, the Congress clearly desired to create a uniform, nationwide regulatory regime which would benefit consumers by requiring substantially similar CMRS providers to compete directly with each other, unimpeded and therefore unprotected by artificial regulatory distinctions.[16]

The Commission, in its implementing regulations, acknowledged that Congress intended to accord similar mobile services similar regulatory treatment.[17] Accordingly, the Commission promulgated a broad definition of CMRS that includes all mobile services and their "functional equivalents."[18]

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[15] Regulatory Treatment of Mobile Services, Third Report and Order in GN Docket No. 93-252, FCC 94-212 at ¶ 4 (Released September 23, 1994)("Third Report and Order").

[16] See H.R. REP. No. 111, 103d Cong., 1st Sess. 259-261 (1993); See also Third Report and Order at ¶ 29.

[17] Second Report and Order at 1418 ("By establishing a new class of commercial mobile radio services, Congress has taken a comprehensive and definitive action to achieve regulatory symmetry in the classification of mobile services."); See also Third Report and Order at ¶¶ 6 and 25.

[18] Second Report and Order at 1447. Carrying out the intent of Congress, the Commission reclassified paging, SMR, ESMR, cellular, PCS, and other mobile services as CMRS. Second Report and Order at 1519. See also Third Report and Order at ¶ 12.

Moreover, while noting its power to impose different Title II obligations upon the various CMRS providers, the Commission nonetheless found that market conditions required equal regulatory treatment of all newly-classified forms of CMRS.[19] Specifically, the Commission found that differential regulation would be justified only when "the possibility [exists] that one carrier or class of carriers has market power."[20] Importantly, it found the market sufficiently competitive to warrant consistent regulations for all CMRS. Most significantly, the tariff obligations the states request to remain enforceable are similar to the types of regulations already forborne by the Commission.[21]

The FCC's decision to subject all CMRS to the same regulatory regime must be observed in the context of state regulation as well. For the Commission now to allow states to

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[19] While the Commission has issued a Notice exploring the efficacy of additional regulatory forbearance for certain CMRS services, it nevertheless removed all tariffing and other burdensome Title II obligations for all CMRS providers. Second Report and Order at 1467-1472. See also Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, Notice of Proposed Rule Making, FCC 94-101 (Released May 4, 1994).

[20] Second Report and Order at 1474 ("At this time, however, differential tariff and exit and entry regulation of CMRS as a general matter does not appear to be warranted.").

[21] See Third Report and Order at ¶ 42 and n. 62.

impose inconsistent regulations on different providers within the CMRS classification would yield precisely the result that Section 332(c) -- amended by Congress just last year -- is designed to remedy. Accordingly, the Commission should reject any requests for differential state regulatory treatment and thereby assure that regulatory parity is maintained and that the disparities once prevalent do not again dominate.

**CONCLUSION**

For the foregoing reasons, CTIA respectfully requests that the Commission deny the petition of the State of New York to retain its existing regulatory authority, even on an interim basis, over intrastate cellular rates.

Respectfully submitted,

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October 19, 1994

## CERTIFICATE OF SERVICE

I, Andrea Williams, hereby certify that on this 19th day of October, 1994 copies of the foregoing Reply Comments of the Cellular Telecommunications Industry Association were served by hand delivery upon the following parties:

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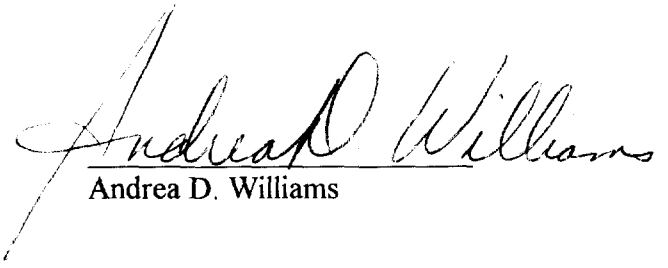

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